

The University of Chicago

CRIMINAL RESPONSIBILITY OF
INDIVIDUALS AND INTER-
NATIONAL LAW

A PART OF A DISSERTATION SUBMITTED TO
THE FACULTY OF THE DIVISION OF THE
SOCIAL SCIENCES IN CANDIDACY FOR THE
DEGREE OF DOCTOR OF PHILOSOPHY

INTERNATIONAL RELATIONS

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By
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THE UNIVERSITY OF CHICAGO
THE DIVISION OF THE PHYSICAL SCIENCES
VI 12 1924

THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 12

JUNE 1945

NUMBER 4

CRIMINAL RESPONSIBILITY OF INDIVIDUALS AND INTERNATIONAL LAW*

ALBERT G. D. LEVY†

I. THE DEVELOPMENT OF CRIMINAL RESPONSIBILITY

THE element of responsibility occupies a singular place in all systems of criminal justice. It appears at every stage of their development: sacrificial execution, offhand popular vengeance, patriarchal paternal power, private self-help, magisterial discipline, or the advanced stage of legislative justice.¹ Criminal responsibility is concerned with a problem of artificial rather than causal relevance, and need not be based upon the intent of the "cul-prit."² Thus, "a person is held responsible when the enlightened public opinion of his age and country demands that he shall be made to suffer in return for pain that he has inflicted."³

Generally we speak of a "development" or "evolution" of the criminal law from the collective (vicarious) responsibility of the primitive community and clan to the individual responsibility of a few, selected (or "found out") with the aid of ever more modernized tools of criminal science or criminology. Collective responsibility may entail destruction of the whole family of the offender, or the retaliatory measures of the primi-

* This paper constitutes the brief summary of a doctoral dissertation which bears the same title and was completed at the University of Chicago, under the direction of Professor Quincy Wright, in the summer of 1944. The author wishes to acknowledge a great indebtedness to Professor Wright for his counsel and guidance both in the dissertation project and in the studies which preceded it.

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¹ Roscoe Pound, *Criminal Justice in America* 56 (1930).

² It will be recalled that the word "culprit" originated from the *crown's reply* to the "not guilty"-plea of the indicted, the abbreviated Latin *cul. pri.* for the English equivalent "ready to prove guilty." Kinney, *Law Dictionary and Glossary* 213 (1893).

³ Charles Mercier, *Criminal Responsibility* 40-41 (1935).

tive blood feud. Retaliation may also become more specific in the form of a *lex talionis*, or again the last shred of humanity might be torn away in the practices of southeastern Asian head-hunting tribes. At this early stage, the failure to distinguish between accident and design is almost inevitable. But in a more advanced period, e.g., Deuteronomy, appoints a city of refuge for the killer by accident, the code of Hammurabi permits him to escape capital punishment by the murder fine, and Germanic law substitutes the *wer* for the blood feud in cases of unintentional homicide.⁴

Religious beliefs play a very direct role in humanizing the process of criminal law. From the theory of witchcraft and possession which prevails among the savages, there leads a path to the punishment of animals and inanimate objects, to modified forms of personal vengeance, and to the utilization of punishment for the protection and promotion of social relationships. Faith in ultimate religious sanctions also permits the eventual adoption of the principle of composition, the common pecuniary liability mentioned above.

It has been observed that "developed" primitive legal systems seemed to consist mainly of "civil law."⁵ One would be equally justified in stating, however, that all primitive legal systems consist of both "civil" and "criminal law" and that whatever civil law comes to exist originated from the early criminal law. What we are accustomed to call "civil law" today prevails over primitive criminal law as soon as pecuniary fines and restitution are introduced. Henceforth criminal law is, so to speak, contained in the civil law until such time as the two are separated, at first imperfectly, later (as only the western European systems achieved it since the Renaissance) perfectly. Predominance of the civil law over the primitive criminal law coincides with the assumption by communal heads and agents of the authority to mete out punishment. The extent to which private vengeance and (centrally) "unauthorized" violence are thus eliminated, determines the cultural progress and maturity in organization of the community concerned.

But numerous writers have pointed out that "the principle of collective responsibility [first encountered in the early criminal law] does not necessarily disappear with the rise of public justice under central authority. It lingers on, partly through sheer conservatism, but also in many cases for political reasons, to a later date."⁶ In fact, in one department of all de-

⁴ Cherry, "Evolution of Criminal Law," in Kocourek and Wigmore, eds., *Evolution of Law* vol. II: *Primitive and Ancient Legal Institutions* 138-44 passim (1915).

⁵ Malinowski, *Crime and Custom in Savage Society* 58 (1926).

⁶ Cherry, *op. cit.*, p. 143.

veloped legal systems, namely that of public and international law, it is never abandoned. The corporate responsibility of civil law relates to the collective responsibility stage of the pecuniary fine rather than to the more primitive one of the blood feud. Collective responsibility of the latter kind is employed, however, in warfare permitted by international law.

While primitive criminal law is naught but unadulterated vengeance and "penal law" the body of rules imposing various forms of composition of the injuries as penalties, developed ("real") criminal law has two different characteristics: it deals only with individual natural persons; and it involves an element of public condemnation in the specification of *crimina*.⁷

The superstitious Greek connection between a primitive idea of sin and an indiscriminate array of wrongs was overcome by the late Roman republic and empire. A great Roman achievement was the better classification of offenses. But since severe wrongs continued to be repressed politically, either by some quasi-judicial process or proscriptions, no neat doctrine of individual responsibility was required. And as regards the classical *privata delicta*, an individual *criminal* responsibility could not be distinguished (if it was at all meant to exist) in the civil law.

Along with the archaic notion of the Greeks and Romans that the punishment of crimes belonged to the general assembly of freemen, the doctrine had grown that responsibility simply meant liability of the wrongdoer to the vengeance of his fellows. The Church, on the other hand, fell heir to the tradition of Stoicism, in which many inarticulate religious and ethical elements had been preserved from earlier periods. Ecclesiastic lawyers were therefore the first to introduce into criminal responsibility the idea of need for expiation of a sin committed against the commandments of God. After deepening the doctrine of criminal responsibility in the provinces of the Roman empire, the Church influence made itself felt among the Franks soon after Clovis' espousal of Christianity in 496, and in due time also reached England. In what was later to become the sphere of criminal law, the worldly legal and the ethical-moral were well on their way to a complete fusion.

The early Church had taught that states became necessary and were instituted as a result of the Fall. But now the ecclesiastic-political doctrine began to be developed that the state was a divine institution, and this was

⁷ The ends of criminal law can only be served by inflicting upon a guilty individual either exemplary or remediative punishment, or both. Whatever is chosen, and however guilt is determined, the subject must always be a natural person.

As for "crimina," it should be noted that the term does not refer to "crimes," but to "accusations." Cf. 1 Stephen, *A History of the Criminal Law of England* 24 (1883); Mommson, *Römisches Strafrecht* 9 ff. (1899).

confirmed in practice by the coronation and consecration of the emperor through the pontiff. The statements of Paul in the New Testament concerning the Roman magistrates were replaced by references to the Old Testament where it spoke of the anointing of David. But the Church was unable to lend reality for long to the myth of a continued Roman empire of the world. If this had at any time been part of some definitely conceived policy, it was soon opposed by the fragmentary break-up of European society.

The limitations of locally administered justice led to a new development of the *poenae naturales*. These were not very different from the earlier concepts of Antiphon and Hippias and of Roman legal doctrine, and ecclesiastic authorities were not disposed to discourage even superstitious belief in such sanctions. On the other hand, the world-wide Church developed a more formal and unified canon law, from the *Decretum Gratiani* about 1140 to the papal decretals of Gregory IX (1234) and his successors, which possessed an elaborate penal law of its own. By the time of Innocent IV, the canonists had advanced the consistency and influence of their criminal rules sufficiently so that the Church could challenge the contradictory statements of the glossators.

Near the end of the thirteenth century, the advisory function of the Church in criminal matters had become indispensable everywhere. Where secular authorities alone were concerned with a wrong, they were eloquent on the divine ordination of their judicial office, they utilized the canonic methods of investigation and absorbed the ecclesiastic terminology into the vernacular language of the forum. When Boniface VIII, in 1302, put forward his claim to judicial omnipotence, the Holy See indeed possessed the better tools to rule. Sovereigns had a confused worldly law to work with, and could no longer represent, let alone defend, their *maiestas* without ecclesiastic support. In the realm of criminal law, the Church alone could determine the "evilness" of a wrong; the sovereign and his agents were mere deputies of the Church or the executors of the clerical judicial decisions. The only quarter which could effectively demonstrate its opposition to the papal claims was the quickly consolidating French state. Philip IV (the Fair) asserted the superiority of national-secular royal power over the (appellate) judicial power of the pontiff.

The universal influence of the Church during the early Middle Ages had rested on the absence of a regular state, the substitute ideal of a world empire based on faith, and the simplicity of social and economic conditions. Eventually, the rise of a number of national states and the growth of social relationships which were more than a match for ecclesiastic controls

brought about the crisis for the medieval Church. National lay influence made itself felt in the *ecclesiae*, and sects were formed. Then the princes concluded concordats with the Holy See and divided the ecclesiastic power in their domain with the pope. The Church widened the scope of lay activities in its organization, and it developed the doctrine of the poor and only spiritual church. But its centralization in the papacy and the conclusion of the concordats enhanced the growth of national states.

Despite the decline of the pervasive judicial power of the pope, wrongs continued to be considered "crimes" when the late medieval Roman-canon law deemed them to be "sins." The theological doctrine of "sin," specifically in the form adopted by the canon law, had originally formed the matrix for the development of what ultimately became the modern criminal responsibility of individuals.⁸ In the sixteenth century, the formulation of this doctrine reached a significant stage, heralded by the resolutions of the Council of Trent. The principal points at issue may be mentioned briefly.

Pelagius (ca. 360-420) had insisted on the fact of the moral responsibility of the individual. To uphold this truth, he showed each sinful act to be a separate and isolated occurrence without peculiar effect upon the character of the doer. Pelagius denied the existence of sinful habit, and pictured the nature of individual responsibility as the power and obligation of every man to do right on all occasions. Unqualified free will and the possibility of sinlessness were the logical results of such reasoning. St. Augustine (354-430), due to his doctrine of imputation and his confusion of Original Sin with Original Guilt, was led to disregard voluntary consent of a person as an essential factor in guilt; he considered all men to be equally guilty. Augustine allowed full moral responsibility to Adam; but he held that all men were potentially in Adam, and, moreover, were Adam when he sinned!

The waywardness of Augustine's philosophy was corrected partly by the semi-Pelagian school, initiated by the Gallican monks (chiefly Johannes Ermitia Cassianus [?360-?435] of Massilia) and the clergy of Southern Gaul early in the fifth century. The semi-Pelagians recognized the full moral responsibility of the individual; each man is condemned by his conscience for every sin as if it were his sole creation. But according to this view, man did not possess the power to do right and abstain from sin un-

⁸ "Sin" occupied exactly the place of the modern *culpa* ("guilt") in the technical criminal law, although nowadays the *content* of the term has been changed from a moral-ethical to a social-psychological one. Cf. 2 Austin, *Lectures on Jurisprudence* 1057, note (5th ed., 1885). J. Grimm even connected the German *Sünde* with *culpa*. Cf. 1 Müller, *The Christian Doctrine of Sin* 89, n. 3 (trans. from 5th German ed. by William Urwick, 1868).

der all circumstances and regardless of his previous history. Moral responsibility was taken to mean rather the power to *desire* and to *endeavor* to do right, however unsuccessful the attempt might turn out.

St. Thomas Aquinas (1225-74) in the main espoused Augustinianism. But since he had "to find a niche for Aristotle in the temple of God,"⁹ Aquinas admitted natural virtues even in the heathen, and tended toward a more liberal view of human nature in general. Throughout the Middle Ages the restlessness and dissatisfaction with Augustine's severe principles continued, and a strong current of opinion favored semi-Pelagianism. While the well-nigh semi-Pelagian canons, issued by the Council of Trent in 1546,¹⁰ finally emerged as the guiding light of the Counter-Reformation, the Protestants returned to the Augustinian anthropology. Both Lutherans and Calvinists imputed such complete depravity to human nature that man could not but be inclined to evil; in their pronouncements it almost appeared as if "since the Fall the image of God is wholly obliterated in mankind."¹¹ It remained reserved to the emancipators of the late eighteenth and early nineteenth centuries to resolve "sin" into mere illusion and unreality, or to trace it to the will of man. Nevertheless, Spinoza (Baruch d'Espinosa, 1632-77) attacked the nature of evil from a purely metaphysical point of view almost a century before, and realist jurists at least equivocated or ignored, if they did not resolve, the problem of sin.

From his interpretation of the Sermon on the Mount, Luther had derived serious misgivings as to the permissibility of all jurisprudence. He calmed his fears with the argument that all human administration of justice was a necessary consequence of the Original Sin, and he merely demanded that the law be popular and intelligible. Calvin, trained jurist that he was, appreciated man-made law as an essential contribution to the governance of society according to Christian principles. Althusius evinced a singular appreciation of the ancient *ratio scripta*, and Melancthon almost identified the Roman law with the Decalogue. But the reintroduction of classical Roman law into the legal and political sciences of the Continent was accomplished by single Calvinist humanists, rather than by the Protestant spirit as such.

At a time when Protestantism still adhered to the traditional ecclesias-

⁹ Moxon, *The Doctrine of Sin* 137 (1922).

¹⁰ This statement applies more to the *effect* of the Tridentine canons in question than to the actual wording. Likewise, it can only be made concerning the treatment of free will by the council. As soon as the element of *grace* is mentioned, in others of the Tridentine canons, the views of St. Anselm, St. Augustine, and St. Thomas unquestionably reappear. Cf. *The Catholic Encyclopaedia* vol. XI, pp. 312-15 (1911).

¹¹ Moxon, *op. cit.*, p. 167.

tic "natural law," the jurists developed a political "natural law" with their newly found classical tools. In the exact sciences, the discoveries of Copernicus (1473-1543), Kepler (1571-1630), Galileo (1564-1642), and Newton (1643-1727) taught the human mind to tread its own paths without the guiding hand of the Church. The law of causality held great appeal for the jurists and political philosophers who had become enamored with the rational elements of the Roman law; in the latter frame of reference it appeared applicable to societal relationships as well. The law of causality was therefore accepted as the all-embracing foundation of a new *Weltanschauung*. And when, during the Enlightenment, the distinction between community and individual came to be further clarified, the new learning was prominently reflected in the penology of Montesquieu, Beccaria, Bentham, and Feuerbach.

II. INDIVIDUAL AND CORPORATE RESPONSIBILITY

Since the fall of the Roman empire, juristic thought has alternated between the concept of a positive world law binding all men, as set forth most clearly by Gaius, but also by Ulpianus, and the concept of an international law binding only states as corporate entities. Both of these concepts, in Latin usage, came to be termed *ius gentium*. Moreover, both could be said to possess a natural-law basis. But the world-law concept (of Gaius and others) aimed at an organized *societas hominum*, and the almost exclusive and far-reaching employment of individual responsibility by this school was primarily designed to that end. Corporate-responsibility doctrines ultimately came to prevail, by and large, in the classical international law. In the following we shall characterize certain traits and tendencies in these developments.

Sovereigns and their agents had always enjoyed a large measure of immunity from the ordinary penal process. A certain tradition of individual responsibility, however, also developed in the public and international affairs of the western world. As *reatus maiestatis*, Henry the Lion was subjected to a feudal-penal process in 1180, which incidentally broke the power of the Guelfs and enabled the Staufer to orient German policy toward Italian enterprises. John Lackland was subjected not only to the feudal trial of 1202, but in all probability also to an *in contumaciam* conviction under the strict French penal law less than a decade later. It appears that Philip Augustus, King of France, wished to stamp John a common criminal (for the murder of Arthur) in order to ease French acquisition of British territory *exheridatione*.

On November 11, 1208, the Guelf Otto IV presided over the trial of

Otto von Wittelsbach who had assassinated the Staufer king, Philip of Suabia, the preceding June 21. Conradin, Duke of Suabia and last of the Staufer, was beheaded on October 29, 1268. His case, however, presents a special problem under the laws of war, namely whether an enemy leader, who has been made a prisoner of war, can be legally put to death.¹² Conradin had suffered defeat at the hands of Charles of Anjou near Tagliacozzo. On April 13, 1313, the Emperor caused Robert of Anjou, King of Naples, to be convicted contumaciously as a traitor, but the sentence ultimately was vacated by Pope Clement V on March 14, 1314. The proceedings against Joan of Naples in the fourteenth century, under accusation of complicity in the murder of her husband Andrew, King of Hungary, were discontinued not long after their initiation.

Mary Queen of Scots was cited before the Royal Commission appointed on October 5, 1586, by Queen Elizabeth, and accused as an accessory to Anthony Babington's plot. The Stuart queen appealed to her rights under the law of nations: *Par in parem potestatem non habet*. Charles I, in January 1649, resolutely objected to the jurisdiction of the special High Court of Justice which the British Parliament had created for his trial. At the conclusion of its summary proceedings this tribunal found, however, that the king could be condemned to death " . . . By the Fundamental law of this kingdom, by the general law of all nations, and the unanimous consent of all rational men in the world. . . . "¹³

Among numerous instances of judicial and summary proceedings against authorized agents of the sovereign or the state, one might mention the impeachment of William, Earl of Portland, in Great Britain, on April 1, 1701, for "concluding the Treaty of Partition, which was . . . dangerous to the peace of Europe."¹⁴ On April 14, 1701, the Commons instituted similar proceedings against John, Lord Sommers, Edward, Earl of Orford, and Charles, Lord Halifax, for advising the Treaty of Partition. Lord Sommers was tried by the Lords on June 17, 1701, in Westminster Hall; the charges against him as well as the other accused ultimately were dismissed. The spectacle was repeated when Oxford and Bolingbroke signed the Treaty of Utrecht.

¹² Nys, *The Trial of Mary Queen of Scots from the Point of View of Public International Law*, 17 *Jurid. Rev.* 50 (1905).

¹³ "A perfect NARRATIVE of the whole PROCEEDINGS of the HIGH COURT OF JUSTICE, in the Trial of the KING, in Westminster-Hall. With the several Speeches of the King, Lord President, and Solicitor General. Published by Authority, to prevent false and impertinent Relations—January 20–27. A.D. 1649. Licensed by Gilbert Mabbot," in 4 Howell, *State Trials*, c. 993, at c. 1032.

¹⁴ Hatsell's *Precedents of Proceedings in the House of Commons*, vol. IV, *Relating to Conference and Impeachment*, p. 255 (1818).

Yet it appears that the doctrine of corporate responsibility was equally well founded in theory and practice. While the Romans internally, also in matters of state, regarded their body politic as a *Gesamtvielheit* (or as a corporate entity only for civil proceedings), they enforced corporate (penal) responsibility in their foreign relations. Carthage, as Troy with the Greeks before, was considered and dealt with as a *Gesamtheit*.

The glossators supported the punishment of *universitates*. But, as can be seen, e.g., from the retribution which was meted out by imperial order for the murder of Bishop Adalbert of Mainz and his companions in 1158, in reality only a few leading actors in the crime were punished by death and the remainder fined. Following the doctrine of Johannes Teutonicus (d. ca. 1220) in the *Glossa ordinaria* to the *Decretum*, Innocent IV taught *Impossibile est quod universitas delinquat*. Thus, *Ad providam*, issued by Clement V under the compulsion of Philip the Fair, abolished the Templars "not by judicial sentence, . . . but by way of an administrative order given in virtue of the fulness of papal authority."¹⁵ Bartolus of Saxoferrato (1314-57) again believed that corporations could commit wrongs and be punished therefor. Among political theorists, "Ockham even went so far as to transfer the lore of corporate delict to the relation between Political Communities and that State which comprises all Mankind, in such wise that by a formal sentence of the Corporation of All Mortal Men (*universitas mortalium*) a guilty Nation might be deprived of any preeminence that it had enjoyed and indeed of all part and lot in the rulership of the World-Community."¹⁶

In practice, however, corporate responsibility resulted either in general pecuniary fines and the dissolution of the *universitas* or in the vicarious capital punishment of individuals. Churchmen like Innocent IV had objected, e.g., to the excommunication of corporate bodies because it would jeopardize the future welfare (in this world and particularly in the next) of the innocent members without justice. A profane lawyer, Johannes Oldendorp (1480-1567), attempted to reconcile the teachings of the canonists (decretists and decretalists) with those of the glossators and post-glossators. He found that an *universitas* could not be distinguished from its individual members *materialiter*, but that it did differ *forma et ordinatio*: denial of this fact would overthrow all civil society. Yet, although he was unable to counter the dictum of Innocent, he held that a community could be held responsible for "omissive wrongs" (non-restraint of agents) and "indirect delicts" (arson, plunder).

¹⁵ As quoted in O'Sullivan and Burns, *Mediaeval Europe* 616 (1943).

¹⁶ Gierke, *Political Theories of the Middle Ages*, trans. F. W. Maitland, 64 (1900).

III. DOCTRINES OF CLASSICAL INTERNATIONAL LAW

The rules which Francisco de Vitoria (1480-1546) initiated, when rising nation-states made the formal arrangement of international relations a necessity, were developed from extant customs, humanitarian recommendations, and purported jural analogies. The responsibility doctrines of international law were primarily designed to decrease the violence, and eventually to bring about the total abolition, of warfare. Vitoria supported the punishment of an enemy even after his defeat in battle and beyond the needs of mere self-defense. But this left aggressors and depraved rulers to be restrained only by acts of high policy as permitted by the fortunes of war.

Balthazar Ayala (1548-84) recommended that the pope be recognized as supreme judge for instances where sovereigns violated the law of nations or resorted to indefensible cruelties in the conduct of their (perhaps initially lawful) military campaigns. Ayala opposed municipal punishment of war criminals: if it did not lead to the unwarranted exculpation of the guilty ones, it could prove subversive to the general order of the state. But just as the Spanish judge advocate opposed the idea of a people trying its own sovereign, he did not deem the enemy qualified to conduct the requisite proceedings after his victory. The power relationship which Ayala proposed in his system could have had important repercussions upon the international order, the pope possessing not only a more or less administrative function (comparable to the modern League of Nations and the courts connected with its system), but also a very real judicial one. Since Ayala relied on a strong international procedure and somehow on real judicial proceedings for rulers and high military leaders (the very point in which he was later opposed by Vattel), he could afford to admit the plea of superior orders for the benefit of ordinary soldiers.

Alberico Gentili (1552-1608), learned civilian and steeped in the doctrines of Bartolus, held that war could be made as "punishment" for "cases in which a sovereign or a nation does wrong."¹⁷ A sovereign, by any (official?) act, *eo ipso* binds his state which, in its entirety, is subject to punishment ("according to the law of nations") for the wrong of the ruler. And the same applies "to instances in which a private individual has done wrong and his sovereign or nation has failed to atone for [note: not *repair*!] his fault."¹⁸

For Hugo Grotius (Huigh de Groot, 1563-1645), as for Gentili, war

¹⁷ De Jure Belli Libri Tres, I, XXI (1598), Carnegie Endowment: Classics of International Law, vol. II, Trans. by J. C. Rolfe (1935).

¹⁸ Ibid.

could not only be an instrument for correcting political situations, but also for meting out punishment. But war as a police action and separate trial of the responsible sovereign could not exist in Grotius' conception. Responsibility, therefore, did not appear to him as the important element, which had to be considered in a trial of individuals upon the successful conclusion of the "just war" (cf. Ayala's proposal, *supra*). Grotius recognized it only as an incidental factor determining the justice and severity of a war. As war itself constitutes the punishment, the responsibility of groups almost eclipses the (original) responsibility of individuals in his arguments.

Grotius held that most wars were not undertaken for the purpose of punishment, although even the latter cause had not infrequently been joined by the desire to make good some loss. He suggested that war as punishment should not be commenced for trivial causes. Grotius pioneered in showing the legality of war, not only for the above-mentioned instances where those, whose interests have been injured, mete out the "retribution," but also for the purpose of humanitarian intervention on behalf of others. A community and/or its rulers may also be held responsible for the crime of a subject if they knew of it and took no such preventive measures as stood in their power to employ. And the same responsibility is incurred by a community and/or its ruler if they do not abide by the principle *aut dedere aut punire*. As Grotius applied the latter rule only to acts which injured mankind at large, he may be said to have laid the groundwork here for the contemporary exemption of "political offenses" from extradition.

The eminent Dutch jurist frankly avowed that, properly speaking, no one should be punished for another's wrong; but he was equally ready to approve certain exceptions. He also stated that the municipal responsibility of a king could only assume a conditional civil character. Vázquez had stated that, "A ruler who maltreats an innocent man by that very act ceases to be a ruler." But Grotius countered such doctrine with the observation that, "A statement either less true or more dangerous than that, it would be hard to make."¹⁹ If the king renounces his governmental authority or has manifestly abandoned it, he is subject to trial just like any other private person; but he cannot be called to account for deeds committed while he was still acting in an official capacity. And, furthermore, "He is by no means to be considered as having renounced a thing who is merely too neglectful of it."²⁰ A ruler is punished either by a "just war"

¹⁹De Jure Belli ac Pacis Libri Tres, 2, I, 9 (2) (1625), Carnegie Endowment: Classics of International Law, vol. II, trans. by Francis W. Kelsey (1925).

²⁰ Ibid., 1, IV, 9.

made upon his domain or by *poenae naturales*. As for the latter, the infliction of great suffering by the Deity upon a people really affects their ruler as punishment.

While Richard Zouche (1590-1660) dealt mainly with the *ius in bello*, as far as his writings on international law are concerned, Samuel Pufendorf (1632-94) furnished comments of a more general nature. The latter stated: "A punishment can in general be defined as an evil of suffering that is inflicted in proportion to the evil of action, or as some troublesome evil which is imposed upon a man by way of coercion, and by the authority of the state, in view of some antecedent delict."²¹ Pufendorf, like Hobbes, regarded the unauthorized crime of the corporation's agent solely as his own responsibility. But if the agent had received the express approval or instruction of the *universitas*, Pufendorf declared him as well as the *universitas* liable to punishment. The corporate entity can be dissolved and all of its guilty members fined. In matters affecting international relations, however, "criminal responsibility" and liability to punishment could only be enforced through the workings of nature since Pufendorf found that no human courts existed to sit in judgment over princes and states. Thus, while Pufendorf did not resort to Grotius' proof of the "indirect" punishment of princes, he simply asked all peoples to suffer the aberrations of their rulers, and the consequences, as "a turn of fortune."²²

Christian Wolff (1679-1754) believed that if a sovereign oppresses his subjects, foreign rulers possess the right of interceding in behalf of the unfortunates. He recommended that such measures of humanitarian intervention be limited to peaceful actions. When a sovereign or a state injures the interests, and imperils the security, of another nation, the latter has the right to self-defense and punishment. The wrong of the sovereign becomes the wrong of the state because in Wolff's system, the sovereign still is the state. "The act of the ruler of a state as such, by which injury is caused to outsiders, the people is bound to assume as its own."²³ A "disturber of public security" can be removed, however, by the (military) action of several other states.

According to Emer de Vattel (1714-87), "the duty and contract of civil society oblige it to make all effort not to change its status."²⁴ But

²¹ De Jure Naturae et Gentium Libri Octo, 8, III, 4 (1672), Carnegie Endowment: Classics of International Law, vol. II, trans. by C. H. Oldfather and W. A. Oldfather (1934).

²² Ibid., 8, III, 30.

²³ Jus Gentium Methodo Scientifica Pertractum, V, 600 (1749), Carnegie Endowment: Classics of International Law, vol. II; trans. by J. H. Drake (1934).

²⁴ Le Droit des Gens, I, XVII, 201 (1758), Carnegie Endowment: Classics of International Law, vol. III, trans. by Charles G. Fenwick (1916).

this is no rigid provision. Ordinarily, sovereigns and states will abide by the rules which Vattel listed for peaceful international relations. Yet while no nation has the right to interfere in the government of another and while no sovereign may make himself judge of the conduct of another, there exists a right of self-protection and united action against a wrongdoer. Subjects may also resist, and separate themselves from, a sovereign who violates the fundamental laws. This principle, however, should not be employed to authorize criminal designs against the peace of nations. Likewise, "It is in violation of the Law of Nations to call on subjects to revolt when they are actually obeying their sovereign, although complaining of his rule."²⁵

Vattel conceded that there were also occasions on which nations need exercise no restraint as regards the right of self-defense and foreign intervention. A sovereign has the duty to avenge injuries to the state and to protect his subjects. He should not permit citizens of his state to offend foreign states or their subjects. Only through express approval of his act by the wrongdoer's state or sovereign will a wrong be charged to the culprit's nation. An offensive war for the punishment of a nation must be founded, "like every other war,"²⁶ upon right (actual injury received and requirements of self-defense) and upon necessity (impossibility of obtaining "just" satisfaction by other means than war). But under no circumstances would Vattel countenance "the dangerous error or the extravagant pretense of those who assume the right to punish a nation for faults which do not concern them; men, who senselessly setting themselves up as defenders of the cause of God, undertake to punish the depravity of morals or the irreligious life of a people who are not committed to their care."²⁷

IV. CRIMINAL RESPONSIBILITY AND CONTEMPORARY INTERNATIONAL LAW

Contemporary international law no longer is the law of sovereigns. It governs the relations between independent states and prescribes state responsibility rather than state conduct.²⁸ International law contains the rules which individuals must observe lest their states be held liable for their acts and omissions. To avoid incurring this quasi-civil liability and exposing themselves to reprisals, governments provide for, respectively assent to, the enforcement of international law through municipal law.

²⁵ *Ibid.*, 2, IV, 56.

²⁶ *Ibid.*, 3, III, 41.

²⁷ *Ibid.*; cf. also 2, VII, 1.

²⁸ Wright, *The Enforcement of International Law through Municipal Law in the United States*, University of Illinois Studies in the Social Sciences, vol. V, No. 1, p. 12 (1916). Cf. *ibid.*, pp. 228-29.

Municipal criminal codes allow the prosecution of individuals whose activities may not directly affect their own state, but might threaten the continued good relations with a foreign country. Libel on a foreign sovereign and injury to an ambassador fall into this category. War crimes and war treason also possess a municipal character. War crimes in the narrow sense include violations of the recognized rules of warfare, hostilities by individuals not members of enemy armed forces, espionage and treachery, and all marauding acts.²⁹ These are distinguished from "ordinary" municipal-law crimes, such as murder and theft, because they primarily serve to enforce norms of international law.³⁰

"International law crimes" are special grounds of state jurisdiction. The offense of piracy (*iure gentium*) has been considered a prototype for all international law crimes. Its origin is dated from the time when the "freedom of the seas" was first enunciated as a principle of the law of nations. In order to insure the continued safety of the merchant ships of the several states and to provide for the effective repression of piratical acts of depredation on the high seas also in the future, the Family of Nations adopted at an early date this dignified form of self-help. This type of customary international law has been supplemented by particular and general conventional international law. Here we find agreements regarding the protection of submarine cables, the policing of the fisheries of the North Sea, the abolition of the slave trade and slavery, the control of the traffic in narcotics, the supervision of the international trade in arms and ammunition and implements of war, the traffic in women and children (white slavery), the liquor traffic in Africa, the suppression of the circulation of obscene publications, the suppression of counterfeiting currency and securities, and the suppression of terrorism. Some of the crimes defined in international conventions have found almost universal enforcement (e.g., Article II of the Cables Convention of 1864 in time of peace, and the Geneva [Red Cross] Conventions of 1864, 1908, and 1929, during hostilities). Others, such as the "crime of war" under the Briand-Kellogg Pact, still are innocuous ideals.

There are various forms in which a state may assume jurisdiction, if a crime has been committed. The territorial principle, "oldest" among the five principles of jurisdiction,³¹ determines jurisdiction by the place where

²⁹ 2 Oppenheim, *International Law* 451 (6th ed., 1940).

³⁰ Cf. Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 35 *Calif. L. Rev.* 530, at pp. 555-56 (1943).

³¹ Cf. *Harvard Draft Convention on Jurisdiction with Respect to Crime*, Edwin D. Dickinson, *Reporter*, 29 *Am. J. Int. L., Supplement*, Part II, pp. 445 ff. (1935).

the crime was committed, which may include cases where the "gist" of the offense consists of the harmful *act* as well as instances where it consists of the *consequence* of the act. The nationality principle refers to jurisdiction over natural persons who are nationals of the state, but also to jurisdiction over corporations and other juristic persons possessing the national character of that state. Among aliens assimilated to nationals may be found those who perform a public function for the state or who are part of the personnel of a ship or aircraft of its flag. If a crime is committed by an alien against the security, the territorial integrity, or the political independence of a state, yet outside of its territory, the courts of that state may assume jurisdiction upon the protective principle. Although the fourth principle, that of universality, has frequently been regarded as the "piracy principle," the Harvard Draft envisages a larger scope for its application. Jurisdiction on the universality principle is the classical alternative to extradition, and many states have made provision in their municipal codes for its exercise. General acceptance of the universality principle by all states for certain acts would render the application of the much-criticized passive-personality principle unnecessary. The latter justifies state jurisdiction solely upon the nationality of the person injured. Prominent Continental writers have denounced this principle as "one of the worst inventions of nationalism in jurisprudence,"³² and both the American Restatement of the Law of Conflict of Laws and the Harvard Draft Convention on Jurisdiction with Respect to Crime have joined in rejecting it.

It is a rule, as Chief Justice Marshall expressed it in *The Antelope*,³³ that: "The courts of no country execute the penal laws of another. . . ." ³⁴ Moreover, no foreign process can be had in criminal cases. This hampers proceedings on the nationality, protective, and passive-personality principles, and it also shows that even the universality principle cannot take the place of a truly international procedure. If the "gist" of the offense consists of the *consequence* of the harmful act or omission, the application of the territorial principle might likewise offer only limited possibilities. In the absence of letters rogatory in these causes, and due to the predomi-

³² Mendelssohn Bartholdy, *The American Restatement of the Law of Conflict of Laws*, Transactions, Grotius Society, vol. XXI, p. 161, at 169, n. (i) (1935).

³³ 10 Wheat. (U.S.) 66 (1825).

³⁴ *Ibid.*, at 125. Precedents: *Folliott v. Ogden*, 1 H. Bl. 123 (1789), *aff'd* in *Ogden v. Folliott*, 3 T.R. 726 (1790); *Ogden v. Folliott*, 4 Bro. P.C. 111 (1792); *Wolff v. Oxholm*, 6 M. and S. 92 (1817). "Penal" laws in Marshall's dictum refer to *criminal* jurisdiction. Cf., *inter alia*, *Huntington v. Attrill*, 146 U.S. 657, 13 S. Ct. 224 (1892), and the Privy Council case by the same parties [1893] A. C. 150.

nantly territorial conception of contemporary criminal law, compensation is sought in the expedient of extradition.

The moral duty of extradition, incumbent upon all states, is usually fortified by treaties. The latter have gradually changed from the list or enumeration system (specifying extradition offenses) to the broader gravity-of-penalty system. Multilateral extradition conventions are a twentieth-century achievement. "The overwhelming majority of treaties provide, in substance, that (1) Extradition is, as a rule, limited to offenses committed outside the territory of the requested State; (2) Extradition may be granted, under specified conditions, for crimes committed within the territory of third States."³⁵ The evidence submitted together with the request for extradition should be such as to establish a *prima facie* case against the accused. American extradition practice considers *in contumaciam* convictions of foreign countries irrelevant; in such cases, the requested person is regarded as *charged with*, not convicted of, the offense. Upon extradition, a person should be prosecuted only for the specific offense for which his surrender was asked of the asylum state.

The exclusion of so-called political offenses from the category of extraditable crimes plays an important, if most controversial, role in contemporary international relations. "Treasons, then," Secretary of State Thomas Jefferson wrote to Messrs. Carmichael and Short in 1792, "taking the *simulated* with the *real*, are sufficiently punished by exile."³⁶ After the Concert of Europe had virtually abolished the political-offense exemptions in 1833, Belgium specially inserted a liberal provision recognizing these in her extradition legislation and in the treaty with France of 1834. Forty-six treaties signed during the following thirty years contained similar articles as the Franco-Belgian agreement.³⁷ In 1856, the Belgian law was modified, however, by the "attentat clause." This provision stated that an attempt against the life of the head of a government or against that of any member of his family, when such an attempt "comprises the act either of murder or assassination, or of poisoning, shall not be considered a political offence or an act connected with such an offence."³⁸ Most of the extradition treaties subsequently concluded contain a similar reservation in one form or another, whenever reference is made to political offenses. The Finnish

³⁵ Harvard Draft Convention on Extradition, Charles K. Burdick, Reporter, 29 Am. J. Int. L., Supplement, Part I, p. 91 (1935).

³⁶ From a statement dated March 22, 1792. Am. State Papers For. Rels. 258; 4 Moore, Digest of International Law 332 (1906).

³⁷ Mander, Foundations of Modern World Society 96 (1941).

³⁸ As quoted *ibid.*

law of 1922 permits extradition of any political offender whose crime involved particular cruelty. As some crimes possess a mixed political and common ("evolutive" or "anterograde" and "retrograde") character, Switzerland, a traditional haven of European political refugees, first adopted the principle of "predominance" in 1892. Hereunder, proof that his crime entailed predominantly political elements rests with the accused individual.

V. WAR CRIMES, THE CRIME OF WAR, AND AN INTERNATIONAL CRIMINAL COURT

Some progress has been achieved in the unification of criminal codes and the international standardization of criminal procedure for safeguarding the peace and welfare of nations. Concrete proposals have also been drafted looking toward the establishment of a direct supranational procedure which can deal with the most dangerous "political crimes," with the "crime of war," and with certain violations of the laws of warfare. A good deal of this preparatory work will be put to the test when the war criminals of the present conflict are punished. According to the Moscow Declaration on German Atrocities, issued on November 1, 1943, most of the culprits "will be brought back to the scene of their crimes and judged on the spot by the people whom they have outraged." Separate provision is being made, however, for dealing with "the case of the major criminals, whose offenses have no particular geographical localization."³⁹ There is strong sentiment now that the latter proceedings be not only of a judicial character, but also that they take place in the permanent forum envisaged by Ayala (1582),⁴⁰ Tsar Nicolas I (1818), Bismarck (1870, *ad hoc?*), the Dutch government in 1920 (saving clause in the reply to the first Allied request for the surrender of the ex-Kaiser), and the late Dr. James Brown Scott (1921).

VI. CONCLUSIONS AND OUTLOOK

Part of the quest for a better world order is the enforcement of adequate individual responsibility under criminal law for the protection of mankind in general. This is a problem which concerns both substantive law and procedure. The well-known Austinian dilemma regarding international law may be resolved by defining the latter as "the science dealing with the area of agreement of the foreign policies (*iura fecialia*) of all civilized states." (*Ius ad bellum* as well as *ius in bello* would be included

³⁹ Department of State Bulletin, vol. IX, p. 310, at 311 (1943).

⁴⁰ The worldly nature of contemporary international institutions does not derogate from the essence of Ayala's proposal, but it eliminates the objections of Vattel.

here because in time of war much of the diplomacy of a state is replaced by the rules and practices of warfare.) International law is, therefore, a coordinating discipline. Now, already the Roman *ius publicum* had much in common with Roman foreign policy as reflected in the *ius feciale*. Even today sovereigns and other representative agents of the state enjoy many of the exemptions in municipal public and administrative law, which they find as privileges and immunities in international law. These considerations lead to the recognition of the "administrative-political" character of international law. One could almost speak of *ius publicum* as "internal administrative law" and of *ius feciale* as "external administrative law" of a state. Our principal shortcomings lie in the failure to discern that "administrative law" (the "external" conniving with the "internal") has limited the "judicial law" excessively. What remains to be shown in another study as "the most judicial law"—namely, criminal law—cannot be enforced on a sufficient scale at present without distinction of the culprit's station—regardless of the harm suffered by humanity at large.⁴¹

The distinction between *ius publicum* and *ius privatum* (Gaius), *gubernaculum* and *jurisdictio* (Bracton), (*regimen*) *regale* and *politicum* (Fortescue)—between the administrative-political and the judicial function—is nothing new. It has recently been recalled for the constitution of municipal systems,⁴² and applies equally well to the realm of international organization where *gubernaculum* presently blots out *jurisdictio*. Nothing can make this clearer than the responsibility doctrines which still prevail in international law. Ideology and political preference play an important role in all phases of the "administrative-political law." In international law they have a far-reaching effect.

The "functionalists" have done much of late to emphasize the ideological, political, and social data to which (the administrative) international law should be adapted. But their arguments are still vitiated by some misleading analogies (e.g., private law) and by occasional confusions of "administrative" and "judicial" law (e.g., the alleged primitivity of international law). The customary distinction between municipal law and international law is useful when one has to deal with more or less technical questions of the enforcement of international law through municipal law. Discussion on this level, however, cannot transcend the narrow limits of national interest; the potentialities of world organization cannot be appreciated. Further progress in (our branch of) jurisprudence would seem

⁴¹ A reassessment of the diplomatic privileges and immunities, *inter alia*, is here envisaged, not their abolition.

⁴² McIlwain, *Constitutionalism, Ancient and Modern*, esp. p. 149 (1940).

to depend upon the adoption of a distinction between *gubernaculum* and *jurisdictio*. This may require a re-examination of "ultimate" legal norms and the classification of all rules of law according to *whom they govern*, not according to *who administers them*. Compare the Permanent Court of International Justice, administering *ius quod ad status litigantes spectat*, and a special world court system, dealing with individuals according to *ius quod ad singulorum et societatis hominum utilitatem spectat*.

As regards procedural matters, we can frankly recognize that a world state is unlikely to be organized in the course of the twentieth century. But international agreements might be concluded for the progressive decrease of the absolute sovereignty of national states. At present, the Conflict of Laws disposes fairly well of the bulk of civil litigations arising between parties in different municipal jurisdictions. The operation of the criminal law irrespective of national boundaries and sectional interests, however, should form one of the main points in the demand for diminished national sovereignty. Formal inauguration of world criminal law is quite feasible,⁴³ and a world criminal court could be established even for our own world order. The technical difficulties which the creation of such a procedure presents can be readily overcome.⁴⁴ For a number of "political crimes" it would become the instance of final appeal, and it could eventually fulfil many of the functions for the world community which the Supreme Court fulfils for the United States. If it is seen more clearly, after the general decrease of *gubernaculum*, that all judges are the agents of the *societas hominum* as conceived by Cicero, and that they do not "belong" to specific national states, there may be less opposition to plans for a world tribunal.

A world criminal court can be widened into a world (supreme) court in a world state. The latter tribunal may consist of two chambers, one dealing with such criminal, and the other dealing with such civil, cases as are conceded to their jurisdiction in the court's statute. In a world of semisovereign states (the farthest goal which can conceivably be reached in our lifetime), the foregoing, as well as the establishment of a world police force for the arrest of culprits and the enforcement of decisions of the world court, would appear premature. But these questions are now under investigation, and, in any event, the "just war" in support of the Briand-Kellogg Pact would constitute the ultimate sanction and safety measure.

Several writers have suggested that in the growth of world government, the nature and function of the League of Nations Assembly may likewise

⁴³ Cf. Ehrlich, *The Sociology of Law*, 36 Harv. L. Rev. 130 (1922).

⁴⁴ Hocking, *Man and the State* 375-76 (1926).

be altered or replaced. Eventually, it may be transformed into a world legislature, which can pass laws, can impeach, and, if necessary, can issue bills of attainder. The world legislature could be organized along the lines of the International Labor Assembly, national (i.e., then "provincial" or "sectional") delegations being composed partly of government representatives (of the state, province, or section) and partly of delegates from the two or more major political parties of the area. Or direct elections could be held for determining the representatives in the world legislature. Even a world-wide synchronization and general unification of the latter type of elections need not be dismissed as wholly utopian. This may promote the crystallization of public opinion for a world state and, ultimately, for the creation of an executive for such a state. It is doubtful, however, whether it will ever be expedient to go in any way beyond a world council in the choice of a world state executive. In the growth of world political parties, sectional differences rather than a "class structure" of world society are more likely to appear as determinants. Whether the so-called world state envisaged by these writers would represent, e.g., a union or a federation, need not be discussed here.

Contemporary international law deals with sovereign nation-states, and looks toward their unreformed preservation. The element of individual responsibility is extraneous to international law. Individual criminal responsibility under world law is not only feasible, but its employment may prove of great benefit in the promotion of a better world order.

